

No. 82-1989

Office-Supreme Court, U.S.

FILED

JUL 5 1982

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THE HONORABLE BENNETT H. BRUMMER,

Public Defender of the
Eleventh Judicial Circuit of Florida, et al,

Petitioners,

vs.

STATE OF FLORIDA, ex rel. JIM SMITH,

Attorney General of the
State of Florida, et al,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD L. JORANDBY,
Public Defender, 15th Judicial Circuit
LOUIS G. CARRES
Assistant Public Defender
Florida Public Defenders Association
224 Datura Street, 13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

RICHARD WILSON
Director, Defender Division
National Legal Aid and Defender Association
1625 K Street, N.W., 8th Floor
Washington, D.C. 20006
(202) 452-0620

NEAL SONNETT
National Association of Criminal Defense Lawyers
Greater Miami Federal Building, 5th Floor
200 S.E. 1st Street
Miami, Florida 33131
(305) 358-7477

Counsel for Amicus Curiae

STATEMENT OF INTEREST OF AMICUS CURIAE

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation comprised of more than two thousand lawyers, judges and law professors whose livelihood brings them into daily contact with the criminal justice system.

The Florida Public Defenders Association (FPDA) is a non-profit Florida corporation comprised of the Public Defenders from the twenty judicial circuits of Florida and their assistants who are charged under the State Constitution and law with the responsibility of providing representation under court appointment to indigent criminal defendants in the State of Florida.

National Legal Aid and Defender

Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to the poor. Its members include the great majority of defender offices, coordinated assigned counsel systems and legal aid societies in the United States. The membership of NLADA also includes two thousand individual members, most of whom are private practitioners.

In their endeavor to assure effective legal services to the poor, the amicus parties also defend against governmental attempts to infringe upon constitutional guarantees, particularly those affecting due process and effective assistance of counsel which are in issue in this case.

Written consent of both parties to the filing of this amicus brief is lodged with the Clerk.

TABLE OF CONTENTS

	<u>PAGE</u>
Statement of Interest of Amicus Curiae	-i-
Table of Contents	-iii-
Table of Citations	-v-
Summary of the Argument	-1-
Reasons for Granting the Writ	
A. The Decision of the Florida Supreme Court Conflicts with the Right of Insolvent Persons to Effective Counsel Acting Independent of State Control Over the Exercise of Professional Judgment	5
B. The Limitation Placed by the Decision Below on the Public Defenders Creates an Arbitrary Distinction Violative of the Equal Protection and Due Process Clauses of the Fourteenth Amendment	8
C. The Inteference with the Authority of the Public Defenders to Exercise Independent Judgment in Representing Their Clients Conflicts with the Lawyers' Role Under the Code of Professional Responsibility	12

TABLE OF CONTENTS (Continued)

D. The Conflict and Tension Created by the Decision Below Between State and Federal Courts Violates the Due Process Clause of the Fourteenth Amendment and Necessitates Resolution by the Supreme Court	14
Conclusion	17
Certificate of Service	19

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE</u>
<u>American Pipe and Construction Co. v. Utah,</u> 414 U.S. 538 (1974)	15
<u>Dade County v. Baker,</u> 362 So.2d 151 (Fla. 3d DCA 1978)	10
<u>Escambia County v. Behr,</u> 384 So.2d 147 (Fla. 1980)	10
<u>Graham v. State,</u> 372 So.2d 1363 (Fla. 1979)	13
<u>Griffin v. Illinois,</u> 351 U.S. 12 (1956)	10
<u>Humphrey v. Cady,</u> 405 U.S. 504 (1972)	5
<u>Polk County v. Dodson,</u> 454 U.S. 312 (1981)	7,11
<u>Shuman v. State,</u> 358 So.2d 1333 (Fla. 1978)	5
<u>Federal Rules of Civil Procedure</u> Rule 23	16
Rule 23(b) (2)	2
<u>OTHER AUTHORITIES</u>	
Code of Professional Responsibility D.R. 5-107(b)	3,13

TABLE OF CITATIONS (continued)

United States Constitution

Sixth Amendment

1,3,6

Fourteenth Amendment

1,3,4,8,

10,11,14,

17

SUMMARY OF THE ARGUMENT

The issues presented by petitioners involve the Sixth and Fourteenth Amendments to the Constitution of the United States. At issue is state interference with the exercise of independent legal judgment by a court-appointed legal counsel on behalf of his clients. The Florida Supreme Court in this case has prevented Florida Public Defenders from invoking the jurisdiction of a federal district court for a class action remedy in a case where the Public Defender has been appointed by the state court to represent the named plaintiff.

The federal district judge in this case denied a motion by respondents which sought to disqualify the Public

Defender as counsel in the federal forum (Petitioners' Appendix - A65-72). The district judge also ruled "that the claims for injunctive relief met the requirements for class action certification under Federal Rule of Civil Procedure 23(b)(2)."

The decision below which held that the state Public Defenders, when appointed to represent the named client, cannot invoke the jurisdiction of federal district courts for employment of a class action remedy raises significant and important federal constitutional questions which amicus curiae urge the Court to review in this case:

(a) Whether the state's interference with the independence of counsel and the exercise of independent

professional judgment infringes upon the right to counsel guaranteed by the Sixth Amendment,

(b) Whether the limitation on the authority of the Public Defenders from seeking certain federal remedies, which limitation does not apply to other appointed counsel for insolvent persons, creates an arbitrary and invidious distinction in violation of the due process and equal protection clauses of the Fourteenth Amendment,

(c) Whether injection of the state authority in the attorney-client relationship of Public Defenders and their clients violates the Sixth and Fourteenth Amendments by violating the Code of Professional Responsibility, D.R. 5-107(b), mandating that an attorney exercise independent judgment

on behalf of a client when employed by another in rendering such services,

(d) Whether the conflict between the state and federal courts concerning the authority of the Public Defenders to seek certain federal remedies for their clients violates the due process clause of the Fourteenth Amendment by attempting to place state restraints upon access to the federal courts.

The issues before the Court in this case are of the utmost importance to the equal administration of justice. Amicus curiae urge the grant of a writ of certiorari because the ruling below will cause certain and irremediable harm to the constitutional rights of innumerable persons who are and will be clients of the Florida Public Defenders.

REASONS FOR GRANTING THE WRIT

- A. THE DECISION OF THE FLORIDA SUPREME COURT CONFLICTS WITH THE RIGHT OF INSOLVENT PERSONS TO EFFECTIVE COUNSEL ACTING INDEPENDENT OF STATE CONTROL OVER THE EXERCISE OF PROFESSIONAL JUDGMENT.

Florida has determined that persons subjected to involuntary commitment proceedings are entitled to constitutional protections:

Those whom the state seeks to involuntarily commit to a mental institution are entitled to the protection of our Constitutions, as are those incarcerated in our correctional institutions.

Shuman v. State, 358 So.2d 1333 (Fla. 1978) at 1335, citing to Humphrey v. Cady, 405 U.S. 504 (1972).

In view of Florida's equation of the rights of indigent mental patients and criminal defendants to access to the courts, the interference by the

state with the independence of counsel to seek a proper remedy for his clients is a violation of the Sixth Amendment right to counsel under the United States Constitution. The decision below creates a significant question of whether a state can, consistent with the Sixth Amendment, limit counsel from seeking some remedies that are available to his client. By singling out the class action injunctive remedy as one which the Public Defender cannot seek for his client, the Florida Supreme Court has prevented counsel from seeking the remedy which would most effectively secure the rights of his clients.

The decision below violates the duty of the state to respect the professional independence of the counsel

it employs to represent insolvent persons. See Polk County v. Dodson, 454 U.S. 312 (1981), at 321-322, that:

[I]t is the constitutional obligation of the State to respect the professional independence of the Public Defenders whom it engages.

The decision below directly conflicts with Dodson. The Florida Supreme Court ruled that the professional judgment of the Public Defender was "of no import" because the Public Defender "must still have the authority to act and here they simply do not." (Petitioners' Appendix - A3-4). Nothing could be more at odds with this Court's decision in Polk County v. Dodson, supra, where it was stated that once appointed the Public Defenders perform essentially a private function "for which state office and

authority are not needed." Id. at 319.

B. THE LIMITATION PLACED BY THE DECISION BELOW ON THE PUBLIC DEFENDERS CREATES AN ARBITRARY DISTINCTION VIOLATIVE OF THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

Solely because the Public Defender was appointed by the state court, the insolvent client has been deprived by the decision below of the aid of his appointed counsel in seeking the most effective judicial remedy available under the circumstances. Since Florida has a dual system of providing counsel for insolvent persons who face a threatened deprivation of liberty, an artificial distinction between the authority of the Public Defender vis a vis the authority of appointed private counsel creates a second class of persons whose rights cannot be fully

vindicated. Florida has a dual system for providing counsel to insolvent persons:

It is clear that Chapter 27.50, Florida Statutes (1977), does not impose an exclusive statutory duty on the public defender to represent all insolvent defendants in all criminal proceedings. The statute, in fact, creates a dual system for delivering defense services to the insolvent poor in criminal cases. The public defender may be appointed by the court to represent an insolvent defendant in felony cases and in certain misdemeanor, municipal or county ordinance, and juvenile delinquency cases. If so appointed, it becomes the public defender's duty to represent such defendant. The court also has the option of appointing a member of the Florida Bar in good standing to represent an insolvent defendant in a criminal proceeding pursuant to either Section 27.53(2) or 27.53(3), Florida Statutes (1957).

Dade County v. Baker, 362 So.2d 151 (Fla. 3d DCA 1978), opinion of Hubbard, J.,
adopted in Escambia County v. Behr,
384 So.2d 147 (Fla. 1980).

The denial to the Public Defenders of the right to seek available and proper federal remedies will inevitably result in the deprivation to their clients of effective remedies available to litigants who have private counsel either retained or appointed to represent them.

This kind of distinction, having no rational basis nor compelling state interest to justify it, implicates the due process and equal protection clauses of the Fourteenth Amendment in a way deserving of the attention of this Court. See Griffin v. Illinois, 351 U.S. 12 (1956), (equal justice

cannot depend on the amount of money one has.)

The distinction between the authority of privately retained as opposed to court-appointed counsel is clearly an invidious discrimination. Additionally, the distinction between the authority of appointed private counsel versus the Public Defenders creates a new and novel discrimination no less at odds with the guarantees of the Fourteenth Amendment. There is a compelling need for this Court to pass upon this question because the ongoing limitation will affect the kind of representation available to over 50,000 persons represented statewide by the Florida Public Defenders. Distinctions between appointed and retained counsel have repeatedly been rejected by this Court. E.g. Polk County v. Dodson, supra, at 318-319.

- C. THE INTERFERENCE WITH THE AUTHORITY OF THE PUBLIC DEFENDERS TO EXERCISE INDEPENDENT JUDGMENT IN REPRESENTING THEIR CLIENTS CONFLICTS WITH THE LAWYERS' ROLE UNDER THE CODE OF PROFESSIONAL RESPONSIBILITY.

Florida has recognized that the responsibility of a lawyer may in some cases require seeking federal relief on behalf of his clients.

Clearly, the State of Florida has no obligation to provide counsel or costs in federal proceedings. This state only has an obligation to provide counsel for indigent defendants in its state courts. Neither this court nor an individual judge in the state system could appoint counsel to represent an indigent in the federal court system. Ross v. Moffitt specifically holds that there is no right of free counsel from the state for an appeal to the United States Supreme Court. This does not mean, however, that state-appointed counsel could not continue their representation and seek federal relief. Their professional responsibility may dictate this action, but, in our view, a state court could

not mandate this action.

Graham v. State, 372 So.2d 1363, 1365
(Fla. 1979).

The Public Defender must, in order to render legal services in compliance with ethical considerations, be free to exercise independent judgment. The Public Defenders are ethically bound to oppose any effort restricting their professional independence. Florida has adopted the Code of Professional Responsibility which requires the following in D.R. 5-107(b):

(B) A lawyer shall not permit a person who ... pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services.

A Public Defender must be unfettered to represent his clients as completely as does private counsel in matters related to the purpose of the

representation.

The decision below establishes a different range of professional activity and ethical standards for court-appointed counsel. This is a compelling case for issuance of a Writ of Certiorari.

D. THE CONFLICT AND TENSION CREATED BY THE DECISION BELOW BETWEEN STATE AND FEDERAL COURTS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND NECESSITATES RESOLUTION BY THE SUPREME COURT.

The Florida Supreme Court decision directly conflicts with the ruling of the federal district judge who denied a motion by respondents to disqualify the Public Defender as counsel. The federal court found the claims proper for class action injunctive relief:

The Court finds that the claims for injunctive relief are sufficient to meet the requirements of 23(b)(2).

(Petitioner's Appendix - A72). The federal court deferred ruling, pending further argument and proof, on the adequacy of class representation. (A 71-72).

The conflict between the federal and state courts created by the decision below interferes with the authority of the federal courts to govern practice and procedures in the federal courts. See American Pipe and Construction Co. v. Utah, 414 U.S. 538 (1974), where it states that the principle of class action procedure is efficiency and economy of litigation. Florida's dual system of providing counsel to insolvent persons will permit some persons to file for a class action remedy. The limitation placed on the Public Defenders will conflict with the

purpose of Federal Rule 23 in avoiding unnecessary multiplicity of actions. The attempt by the Florida Supreme Court to regulate the remedy which Public Defender counsel can seek for their clients in federal court invades the authority of the federal courts to regulate practice and procedure in the federal courts.

The record in the present case is uncontroversible and specific proof that the Supreme Court of Florida has used its power to interfere in matters of federal jurisdiction.

This controversy is of such significance, and without other adequate form of resolution, that the Supreme Court should issue the writ of certiorari to decide whether this kind of limitation is in derogation of the

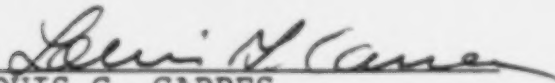
due process clause of the Fourteenth Amendment by placing a state restraint upon access to the federal courts for a proper and effective remedy in matters falling within the jurisdiction of the federal courts.

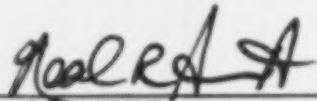
CONCLUSION

Wherefore, the amicus curiae parties respectfully submit that these issues are of critical and urgent importance to the fair and equal administration of justice, that there is a compelling need for prompt resolution of this controversy, and the Court should issue a Writ of Certiorari to review the decision of the Florida Supreme Court.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender


LOUIS G. CARRES
Assistant Public Defender
15th Judicial Circuit of
Florida
224 Datura Street/13th Floor
West Palm Beach, Florida
33401
(305) 837-2150


NEAL SONNETT
National Association of Criminal
Defense Lawyers
Greater Miami Federal Building,
5th Floor
200 S.E. 1st Street
Miami, Florida
33131
(305) 358-7477

RICHARD WILSON
Director, Defender Division
National Legal Aid and Defender
Association
1625 K Street, N.W., 8th Floor
Washington, D.C. 20006
(202) 452-0620

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I, NEAL SONNETT, do hereby certify that service of three (3) true copies hereof has been made upon all parties required to be served, by depositing same in the U.S. Mail, postage prepaid, addressed to:

- (1) Parker D. Thomson
Paul & Thomson
1300 Southeast Bank Building
Miami, Florida 33131
Attorney for Petitioner
- (2) Carolyn M. Snurkowski
Assistant Attorney General
Bureau Chief, Miami Division
Department of Legal Affairs
401 N.W. 2nd Avenue, Suite 820
Miami, Florida 33128
- (3) Melinda S. Thornton
Assistant County Attorney
1626 Dade County Courthouse
Miami, Florida 33131

(4) The Honorable Jim Smith
Attorney General of the State
of Florida
The Capitol
Tallahassee, Florida 32304

this 18 day of ~~June~~^{July}, 1983.



NEAL SONNETT